

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO O. DOSS,

Defendant-Appellant.

UNPUBLISHED

May 18, 1999

No. 203666

Recorder's Court

LC No. 96-001860

Before: Markey, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Defendant appeals by leave granted from his jury trial conviction for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to six to twenty years in prison for the possession with intent to deliver less than fifty grams of cocaine conviction which was to run consecutively to a one to twenty-year sentence on an unrelated conviction. We affirm.

I

Defendant's first claim of error is that his conviction was against the great weight of the evidence. This issue has not been preserved for appellate review because defendant failed to make a timely motion for new trial before the trial court. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

Even if we were to review defendant's claim of error, he presents nothing more than a credibility contest between prosecution and defense witnesses. We defer to both the jury and the trial judge who were present in the court room to observe the conflicting testimony of the witnesses when reviewing a claim that a verdict was against the great weight of the evidence. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). Accordingly, we hold that defendant's conviction was not against the great weight of the evidence.

II

Defendant next raises several claims of prosecutorial misconduct, which he argues require reversal of his conviction. We disagree.

The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). Questions regarding prosecutorial misconduct are decided on a case-by-case basis. We evaluate the prosecutor's remarks in context, and in light of defense arguments and the evidence admitted at trial. See *People v Lawton*, 196 Mich App 351, 353-354; 492 NW2d 810 (1992).

Defendant first argues that questions by the prosecutor amounted to prosecutorial misconduct because they bolstered the testimony of the prosecution's witnesses, improperly asked defendant to comment on another witness' credibility, and asked defendant to state what the jury believed. We find that the questions by the prosecutor regarding whether another witness was lying are very similar to questions our Supreme Court found to be not unfairly prejudicial in *People v Buckley*, 424 Mich 1, 7-8 n 3, 17; 378 NW2d 432 (1985). Further, we do not see, nor does defendant show, any resultant prejudice from the prosecutor's questions.

Defendant also raises several other claims of prosecutorial misconduct; however, the statements giving rise to these claims were not objected to at trial. Appellate review of alleged improper remarks by the prosecution is precluded if a defendant fails to make timely and specific objections unless a failure to review the claim would result in a miscarriage of justice or a curative instruction could not have eliminated the prejudicial effect of the alleged misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Vaughn*, 186 Mich App 376, 384-385; 465 NW2d 365 (1990). In the present case, any prejudice resulting from these alleged claims of prosecutorial misconduct could have been eliminated by a curative instruction; therefore, we decline to review defendant's remaining claims of prosecutorial misconduct.

Defendant further argues that the cumulative effect of the alleged instances of prosecutorial misconduct warrant reversal. However, after a careful review of the record before us we conclude that, viewed as a whole, the prosecutor's remarks and questions did not deprive defendant of a fair trial. *Howard, supra* at 544. Therefore, this argument fails as well.

III

Finally, defendant argues that he should be resentenced because his sentence is disproportionate and the trial court imposed sentence while in an agitated state, caused by an unrelated matter. We disagree.

Defendant's minimum sentence of six years falls within the range of two to eight years recommended by the sentencing guidelines, and is thus presumed to be proportionate. *People v Kennebrew*, 220 Mich App 601, 611; 560 NW2d 354 (1996). Defendant has failed to present any unusual circumstances at sentencing or on appeal that would overcome this presumption. See *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995).

Affirmed.

/s/ Jane E. Markey

/s/ Donald E. Holbrook, Jr.

/s/ Janet T. Neff